NO. 837

IN THE

United States Circuit Court

Of Appeals

FOR THE NINTH CIRCUIT

Jessie M. Smith, Ephrain P. Ellison, Elias Adams, John W. Thornley, James W. Chipman, James Love, Anthon J. Neilson, Benjamin R. Meek, Peter A. Neilson, Joseph S. Neilson, Heber A. Smith, Hans S. Neilson, Andrew Allen, Ellsworth Allen, Riley Allen, Isaac Dunyon, Aurelius Fitzgerald, Henry Chipman, Benjamin Dansie, Thomas Mercer, William Aylett, Heber Aylett, John A. Egbert, George Dansie, Frank Dansie, William Crane, I. J. Freeman, Joseph R. Olsen, L. Parker,

Appellants,

vs.

Thomas G. Lowe, John R. Thomas, David W. Jones, D. H. Anderson, John Doe and Richard Roe, whose other and true names are unknown.

Appellees.

APPELLEES' BRIEF.

UPON APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF IDAHO.

FRANK MARTIN,
Attorney General,
W. E. BORAH, and
E. J. DOCKERY,
Attorneys for Appellees.

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Appellants,

vs.

Thomas G. Lowe, John R. Thompas, David W. Jones, D. H. Anderson, John Doe and Richard Roe, whose other or true names are unknown,

Appellees.

STATEMENT OF FACTS.

This case, so far as our diligent investigation of the books discloses, stands unique and alone not only

in the question raised for determination, but in the form of its raising. Several questions are incidentally discussed by appellants but in fact only one undetermined question is presented to the Court, i. e.: Is it within the province of the Federal Courts to inquire into the sufficiency of the facts and the good faith of the chief executive officer of a sovereign state in issuing a quarantine regulation under a state law declared by the Supreme Court of the United States to be constitutional?

The facts are briefly these: The State of Idaho enacted a law (fully set forth on pp. 18 and 19 of the transcript) which obligated the Governor of Idaho, whenever it came to his knowledge, that diseased sheep of adjoining states were being driven into the state and endangering the health of Idaho sheep, to issue an appropriate quarantine proclamation excluding such sheep until restored to a healthy condition. Under authority of this law and upon information furnished by the State Sheep Inspector after a personal examination, and by affidavits of reputable citizens, the Governor of Idaho on March 9th, 1901, promulgated a proclamation (which is set forth in full on pp. 15 to 17 of the transcript) prohibiting the driving of sheep from the infected regions of Utah, into Idaho, for a period of forty days.

The appellants, residents of Utah, and owners of sheep which had been kept during the winter in the districts designated in the Governor's proclamation, by bill filed March 21st, 1901, in the Circuit Court of Idaho, prayed for the issuance of an injunction to restrain the Idaho officers, the State Sheep Inspector and his deputies, the appellees herein, from enforcing the law and the Governor's proclamation. To this

bill the appellees demurred, which demurrer was sustained by the Honorable Circuit Court from which order this appeal is taken to this Court.

History of the Legislation, by the State of Idaho, in Reference to the Disease of Sheep:

A brief reference to the laws passed by the State of Idaho to protect its flocks from disease may be of interest to this Court in the decision of this case. The Court will no doubt take notice that sheep raising is one of the great industries of the State of Idaho; and its citizens and sheep owners were early impressed with the fact that it was best from a business standpoint to keep their flocks free from the disease of scab or scabbies, which is very prevalent and disastrous among flocks unless great care is taken, as will be shown by an examination of the bulletins issued by the Government Bureau of Animal Industry. Acting upon this idea, the State Legislature in 1887 enacted a law which required the County Commissioners of each county to appoint a Sheep Commissioner who should examine all sheep in his county, and as often as notified by anyone of diseased sheep, and imposed a penalty upon the owner of sheep driving or ranging sheep known to be diseased. Chap. VI., Title VII., Rev. Stats., 1887. This Act was superceded by an Act of the Legislature, approved March 2, 1893, which was much more stringent in its terms and required the Inspector to inspect all sheep in his county between the 15th day of April and the 15th day of May, and as often thereafter as he received information that any sheep in his county were infected with scab or any other disease, and that if he found any disease among any bands of sheep in his county he should quarantine said sheep and hold

them from other sheep until they were cured. It prohibited anyone from herding or driving any infected sheep upon the range or highways and inflicted a heavy penalty upon anyone violating the law. It declared in terms that an emergency existed for the law in consequence of the rapid spread among sheep of contagious or infectious diseases. This law will be found on page 79 of the laws of 1893.

The next legislature of the state, which convened in 1895, created the office of State Sheep Inspector, and passed a still more stringent law, requiring Idaho sheep owners to cure their flocks from disease. Laws 1895, page 124.

The succeeding legislature passed another law upon the subject by which additional care was taken requiring the flocks of Idaho to be inspected, dipped and kept free from disease, and imposing additional penalties for violation of its provisions. Laws 1897, page 115.

The law was again strengthened and additional strictness provided for by and Act of the Legislature approved February 5, 1899. Laws 1899, page 352.

The legislature of 1901 enacted the present law which is found on page 142 of the laws of that session and embodied in the Political Code of the State, 1901 in Chapter XVII., Sections 689 to 710. This law requires the State Sheep Inspector and his deputies to inspect all sheep in the State twice each year, and as oftener as reliable information shall be furnished of disease in any band of sheep. If, on the inspection of any band of sheep, any of them are found to be diseased the inspector or his deputy is required to quarantine said sheep so that the disease

may have no opportunity to spread and require said sheep to be dipped until said disease is cured; and this dipping does not apply to the diseased sheep alone, but to the entire band in which any diseased sheep are found. And in this law the Court will find the most stringent provisions for the protection of sheep-owners from being infected by diseased sheep; and against any person having diseased sheep driving them across the ranges, corralling, or in any other manner coming in contact with other sheep, and the greatest care is exercised to see that the disease is not communicated to other bands; and the said inspector or one of his deputies must be at once notified if any disease is discovered. Heavy penalties are imposed for violation of any of these provisions.

The state found that it could gain but little by requiring its own sheep to be dipped and cleaned of disease, at great expense to the owners, unless it could in some way protect them from the large bands of diseased sheep, numbering hundreds of thousands, driven into the state each year from adjoining states. So in order to protect its flocks from diseased sheep that were brought from other states, where no care was exercised by the state to free them from disease, the Legislature in 1897 passed an Act which required sheep, before entering the state, and when within twenty miles of the state line, to be quarantined and dipped. This law was held to be in conflict with the provisions of the Constitution of the United States in the case of State vs. Duckworth, (Idaho) 51 Pac. 456 by the Supreme Court of Idaho.

In 1899 the Legislature passed an Act, approved March 13th, which was as follows:

H. B. No. 343.

An Act Establishing Quarantine against Diseased Sheep, Prescribing the duties of the Governor in Relation thereto, and Providing Penalties for the Infraction of Its provisions.

Be it Enacted by the Legislature of the State of Idaho:

SECTION 1. Whenever the Governor of the State of Idaho has reasons to believe that scab or any other infectious disease of sheep has become epidemic in certain localities in any other state or territory, or that conditions exists that render sheep likely to convey disease, he must thereupon, by proclamation, designate such localities and prohibit the importation from them of any sheep into the state, except under such restrictions as, after consultation with the State Sheep Inspector, he may deem proper.

Any person or corporation who, after publication of such proclamation, receives in charge any such sheep from any of the prohibited districts and transports, conveys or drives the same to and within the limits of any of the counties of this state, is punishable by fine not exceeding $1,000, nor less than $200, and is liable for all damages that may be sustained by any person by reason of the importation or transportation of such prohibited sheep.

SEC. 2. Upon issuing such proclamation, the owners or persons in charge of any sheep being shipped into Idaho, against which quarantine has been declared, must forthwith notify the Deputy Inspector of the county into which such sheep first

come, of such arrival, and such owner or persons in charge must not allow any sheep so quarantined to pass over or upon any public highway, or upon the ranges occupied by other sheep, or within five miles of any corral in which sheep are usually corralled until such sheep have first been inspected, and any person failing to comply with the provisions of this section is punishable as provided in section one of this Act and is liable for all damages sustained by any person by reason of the failure to comply with the provisions of this section.

Sec. 3. Whereas an emergency exists, this Act shall be in force from and after its passage.

Approved, March 13, 1899.

Under this law the Governor of the State on the 12th day of April, 1899, issued the following proclamation:

Whereas, I have received statements from reliable wool-growers and stock-raisers of the State of Idaho, said statements being supplemented by affidavits of reputable persons, all to the effect that the disease known as scab or scabbies is epidemic among sheep in certain localities or districts, vis: In the County of Cache, State of Utah; the County of Box Elder, in the State of Utah; and the County of Elko, in the State of Nevada; and

Whereas, It is known that sheep from said districts are annually moved, driven or imported into the State of Idaho, and if so moved would thereby spread infection and disease on the ranges and among the sheep of this state, which act would result in great disaster.

"Now, therefore, I, Frank Steunenberg, Governor of the State of Idaho, by virtue of authority in me vested, and after due consultation with the State Sheep Inspector, do hereby prohibit the importation, driving or moving into the State of Idaho of all sheep now being held, herded or ranged within said infected districts, viz: The county of Cache, in the State of Utah; the County of Box Elder, in the State Utah, and the County of Elko, in the State of Nevada, or which may hereafter be held, herded or ranged within said infected districts, for a period of sixty days from and after the date of this proclamation; after the termination of said sixty days sheep can be moved into this state only upon compliance with the laws of the State of Idaho regarding the inspection and dipping of sheep."

This law and proclamation were before the Supreme Court of the State of Idaho in the case of State vs. Rasmussen, a Utah sheep owner.

State vs. Rasmussen, (Idaho) 59 Pac. 933.

The Court held that the law and proclamation together with its enforcement, which were exactly the same as involved in this case, were a proper quarantine regulation and were not in violation of any of the provisions of the State Constitution, or the constitution of the United States, or the laws of Congress. This decision was taken to the United States Supreme Court by a writ of review and was passed upon by that Court in State vs. Rasmussen, 181 U. S., 198; 45 L. Ed. 820. The opinion of the Court was rendered by Justice Brewer, and closed with these words: "The

statute was an Act of the State of Idaho contemplating solely the protection of its own sheep from the introduction among them of an infectious disease, and provided for only such restraints upon the introduction of sheep from other states as in the judgment of the state was absolutely necessary to prevent the spread of disease. * * * * is fairly to be considered a purely quarantine act, and containing within its provisions nothing which is not reasonably appropriate therefor. There being no other Federal question in the case, the judgment of the Supreme Court of Idaho is affirmed."

The Legislature of 1901 passed the Act set out in the record as "Exhibit B," page 18, and under its provisions the Governor issued the proclamation "Exhibit A," page 15, of the record, out of which grew the present action, which is only one chapter in a series of suits, during the last few years, in which the State of Idaho, has sought to protect its flocks from being destroyed by the disease-ladened sheep brought into the State each year from the desert of Utah. We desire in this connection to invite the Court to glance at the various statutes of the State of Idaho upon this subject, as evidence of the great care and good faith which the State of Idaho has exhibited in its attempts to keep its herds and flocks free from disease; and in contrast we invite the attention of the Court to the legislation of the State of Utah. It will be found that Utah is behind all other sheep-raising western states in the enactment of appropriate and effective laws to free its sheep from disease and to protect them from becoming diseased. The legislation on this question will be found in Section 63, Rev. Stats. of Utah as follows: "Every person owning, controlling

or ranging sheep in the State shall have all such sheep thoroughly dipped at least once a year, in some preparation that will kill scab, or shall be deemed guilty of a misdemeanor and upon conviction thereof may be fined in any sum not exceeding $100.00 for each offense."

No doubt the appellants in this case would insist there, as they did at the Idaho line, that their sheep were healthy and no dipping was necessary; or it may be possible also that it would be cheaper for each of the appellants to pay the small fine provided for of $100.00 than to dip the number of sheep owned by him.

An examination of the bulletins issued by the Government Bureau of Animal Industry will show that one dipping each year is of no practical benefit whatever in destroying this disease. Bulletin 21, page 14. That the disease can be cured by proper treatment, see Bulletin 21, pages 21 and 23.

As showing a comparison between the sheep of Idaho and those of the surrounding states in regard to disease we quote the following from the report of the State Sheep Inspector made to the Governor of Idaho on December 31, 1901, and the quotation is taken from the report of the Federal Inspector of the sheep shipped from the various states mentioned during the year 1901.

"The figures given in this report are supported by the report of the Federal Inspectors, which was obtained by them in their examination of sheep inspected to go into the markets or otherwise all interstate shipments made by rail, which our State Inspectors take no part. This report is as follows:

"Idaho shipped out 796,991 sheep, 15,335 condemned, being less than two per cent. scabby. Utah shipped 513,992 sheep, 64,269 condemned; Wyoming shipped 528,577 sheep, 34,430 condemned; Montana shipped 308,971 sheep, none condemned. It must also be remembered that two lots of these sheep condemned in Idaho was sheep brought into this state from Utah, in violation of the proclamation."

PECULIAR CHARACTER OF APPELLANT'S BILL AND BRIEF.

In view of the legislation enacted from time to time to eradicate the disease of scab among the sheep of Idaho and the indifferent legislation of the State of Utah upon the subject; and in view of the painstaking efforts of the Governor of Idaho, as disclosed in his proclamation, to ascertain the condition of the health of the quarantined sheep, we cannot withhold surprise at the impassioned, not to say discourteous, tone of appellants' bill and brief in this case. Every page of both the bill and brief bristles with italics and charges questioning the motives of the Idaho officials, and straining acknowledged principles of law to the breaking point.

In appellants' bill on page 6 of the transcript we are told that the Idaho officers "will prevent said sheep from grazing and pasturing or traveling over the said 'public domain" of the United States into the said State of Idaho, for the sole purpose of enabling said defendants, their associates, their agents and confederates to monopolize and exclusively use said range, and graze their own sheep and cattle upon said lands of the United States," and again on pages 9 and 10 of the transcript the bill in speaking of the

Governor's proclamation tells us that "the recital therein, etc., is wholly false and untrue in fact, and the said alleged information upon which said proclamation is based, if such has been given, is entirely false and groundless and given to said Governor solely for the purpose of enabling said defendants and their said associates and confederates to have and enjoy a monopoly of the grazing lands of the said "public domain" of the United States for themselves. * * * "That the said proclamation of the Governor of the State of Idaho is an arbitrary and unwarranted exercise of power and the alleged facts upon which it is claimed to be justified and based are wholly false." And on page 11 the bill continues in the same vein; " that said defendants threaten to, and will if not prohibited by this Court, confiscate and appropriate to their own use by force, the said sheep of the plaintiffs. That said defendants allege that they will use an army of citizens of the State of Idaho to force and drive said sheep out of the state into the State of Utah; and that they will with force take for their own use so many of said sheep so entering the State of Idaho as will fully compensate themselves and those so aiding them for their time and service without trial or any process of law whatever, of any of said sheep remaining alive after having been so driven back as aforesaid and abused by the defendants." On page 4 of appellant's brief the Court is asked: "Can the live stock growers of the State of Idaho, with the aid of willing State officials, secure for themselves a monopoly of the grass growing upon the public domain of the general government of that State?" And on page 7 the conspiracy of the State officials is again reiterated in the following language: "The complaint further alleges that the Appellees and their confederates and

their agents were so preventing the Appellants from driving their sheep into the State of Idaho in order to obtain for themselves and those associated with them the exclusive use of said public range in the State of Idaho and the grass growing upon the lands of the government of the United States therein."

On page 8 the Governor's proclamation is not only declared false, but it is insinuated that no information was received by him upon which the proclamation was based, as follows: "That the facts alleged, and which are claimed to exist and which are referred to in said proclamation as a reason for making said proclamation are false, are groundless, and were given to said Governor, if he has received the same, for the sole purpose of inducing him to assist the Appellees, their associates and confederates in obtaining for themselves a monopoly of the grazing lands on the public domain of the United States."

And bad faith is insinuated, if not asserted, by the following language on page 9: "The question presented then is as to whether an action of the Governor of the State of Idaho in making said proclamation is final and conclusive, and cannot be questioned irrespective of the motive or purpose behind it, or the gross wrong which is attempted, or may be attempted to be accomplished through the executive department of the State, however unwise or vicious it may be."

Even the Honorable Circuit Court comes within the purview of counsel for Appellants' caustic comments. On pages 12 and 13 of their brief, after placing their own interpretation upon the law, they continue: "Such being the law, it is difficult to under-

stand why the trial Court, in view of the facts alleged, should have had any doubt about the sufficiency of Appellants' complaint." And again on page 14: "It thus appears that said decisions were controlling in the judgment of the trial Court, and in effect determined that no matter what the wrong might be, so long as it masqueraded under the guise of the quarantine law of the State, it cannot be investigated." * * * "This conclusion is in direct opposition to every decision on the question, and no decision can be found to sustain any such a conclusion, but on the contrary the decisions above, including the decisions to which the lower Court referred, announces a contrary doctrine." And again on page 17: "How this case could have misled the lower Court, as it seems to have done, is hard to understand."

Returning to the discussion of the executive officers, on page 17, appellants' counsel informs us that "The appellants rely on the bad faith of the officers and the total absence of facts warranting any quarantine regulation." And on page 18 we are told of official indecency and of masquerading, and likened unto highwaymen in the following language: "If this be true, and it is not yet challenged, what could be more unjustifiable and manifest violation of Constitutional rights, to say nothing of official decency."

"The quarantine regulation in question can scarcely be said to be a pretense or masquerade, it is practically on a par with the action of a bold highwayman. The lower court certainly overlooked, or did not take this undenied allegation seriously." On page 23 of this extraordinary brief, the bold charge is made of a dishonorable alliance between the Gov-

ernor of Idaho and the railroads of the State to wrong the outside world. Referring to that portion of the Governor's proclamation on the matter of quarantine of sheep shipped into the State on railroads, we are told: "Its manifest purpose is to hold the good will of the railroad companies, and to prevent their joining in a contest against the State and its favored stockmen."

On page 26 of their brief some virtue is acknowledged in the Constitution and laws of Idaho but all virtue and intelligence are withheld from official sheep inspectors: "Even the Constitution and laws of Idaho confine the exercise of judicial functions to certain courts, not including sheep inspectors, many of whom can scarcely read the law or anything else. To know a scabby sheep when they see it is their only qualification."

Such sweeping denunciation of the officials of a State, particularly in the light of this Court's official knowledge to the contrary, carries with it its own condemnation.

ARGUMENT.

Happily the question of the constitutionality of the Act of the Legislature of Idaho providing for a quarantine against foreign diseased sheep is eliminated from this case by the decision of the Supreme Court of the United States in the case of Rasmussen vs. Idaho, 181 U. S. 198, 45 Law, Ed. 820.

In the above case this law and a proclamation of the Governor of Idaho, based upon it—a proclamation not only identical in all essential particulars with the proclamation involved in this case but promulgated and executed in the same manner—was held not to be

in contravention with either Sec. 8, Art. I., Sec. 2, Art. IV., or the Fourteenth Amendment of the Federal Constitution. A re-discussion therefore of either the law or proclamation in question here would be superfluous.

That every state is fully empowered to enact and execute reasonable quarantine laws against every other state has been so repeatedly adjudicated and so universally acknowledged as to need no discussion or citation of authorities; and no decision of Courts exist where a quarantine law has been declared unconstitutional except it appeared upon the face of the law or health regulations that it was manifestly unjust, unreasonable or in plain conflict with constitutional provisions or Federal laws which guard the interstate rights of citizens. The law of all of the decisions of Courts cited by Appellants in reference to quarantine laws, may, so far as this case is concerned, be admitted, as it has no bearing upon the real question at issue. Our admission, however, we respectfully submit, is limited to the law as plainly written by the Courts whose decisions are cited; and we must withhold endorsement of much of the peculiar interpretation given to the law by Appellants' counsel.

The question, and the only question, squarely presented here, is: Will this Court go back of the executive duty of the Governor of a state, involving an exercise of judgment and discretion, and inquire into the sufficiency or good faith of that officer, who has embodied in him the dignity and sovereignty of a sovereign state; and then perchance substitute the discretion and judgment of a high Federal authority.

We respectfully venture it as our candid judg-

ment that this Court will sustain the course of the Honorable Circuit Court of Idaho in declining to exercise so extraordinary a power by invading the sovereign prerogative of a Governor of a state of this Union.

We do not desire to be understood as claiming that the Governor of a State would not have an executive order, subversive of the Federal Constitution or laws, annulled by the courts the same as any unconstitutional law passed by a state would be so declared by the courts. Neither do we claim it inconceivable that a Governor might promulgate, under a valid law, a quarantine regulation which would be adjudged unconstitutional because manifestly too arbitrary, unjust, or unreasonable upon its face. What we do contend, however, is, that when the Governor of a State has a prescribed legal duty to perform and performs that duty, after an examination of the facts which in his judgement demand executive action under the law a Federal Court will not set on foot an investigation of the facts upon which the Governor acted or institute an investigation of the good faith of the head of a State into whose hands the executive sovereignty of the State is reposed. If our position is not correct then the Governors of the States are wholly subordinated to the Federal Courts in the exercise of their executive functions. If the Federal Courts can go beyond the constitution and law, beyond the language of executive proclamation and the facts of which courts take judicial knowledge, and inquire into the facts upon which the Governor acted after he has taken action; are we not right in asserting, that this would be practically requiring that the Governor first petition the Federal Court for permission to perform his executive duties?

We need not here elaborate upon the universal policy of courts to preserve at all times to the fullest extent the integrity of the co-ordinate branches of the government; nor need we advert to the reluctance of Federal Courts to assume to supervise the actions of state officers, and particularly Governors of States, in the performance of their duties prescribed by the laws, and will not do so unless upon well-settled ground for equitable interference.

In the vast number of reported decisions of courts there may be some authority extant upholding a court in entering into a contest of judgment with an executive acting within his province, but after diligent search we have been wholly unable to discover any such law, and, of a certainty, counsel for appellants have cited no such law.

High on Injunctions, Sec. 124, third Ed., clearly states the relationship of State and Federal authorities, viz.:

"From the peculiar form and structure of our system of government, each state being sovereign and independent within itself, except so far as its sovereignty may have been delegated to the general government, it follows that the chief executive officers of the different states are entirely independent of control by the Federal judiciary in the performance of their official duties, and these duties cannot be coerced by mandamus from the Federal courts. And while it is the plain and imperative duty of the Governor of any State, upon proper demand made by a Governor of any other State, to deliver up fugitives from justice from such other State, this duty being imposed upon him by the constitution and laws of the United States, yet the Federal courts are power-

less to compel the performance of this duty, and cannot grant a writ of mandamus in such a case, even though the act to be performed is purely ministerial. The performance of such duties is to be left to the fidelity of the executive of each State to the compact entered into with the other States when it became a member of the Union; and, if he refuses to perform so plain a duty, there is no power in the Federal government to coerce its performance."

If the Federal court lacks the power to compel a State executive to perform a legal duty, whence shall the court obtain power to prevent an executive from performing a legal duty?

The Governor of a State is not subject to injunction by courts in matters wherein he is acting in his official and discretionary capacity.

State, ex. rel. Taylor vs. Lord (Ore.) 31 L. R. A. 473. See pages 479 to 481.

"And while none of these facts would excuse the court from assuming jurisdiction, if its right to do so was clear, nor would the exposition given the constitution by the other departments be absolutely controlling upon it, when called upon, in the discharge of its duty, to construe that instrument, yet they afford a very persuasive argument why the court should not struggle to find some grounds, doubtful at best, upon which it can rest its jurisdiction. Before it could assume the power to question the legality of the actions of the other departments of the govern-

ment in such a case its right to do so ought to be beyond all possible question, and it ought to be able to place its jurisdiction upon some well settled ground for equitable interference."

Same case, p. 483.

The purpose of a statute must be determined by its natural and reasonable effect.

Henderson vs. New York, 92 U. S. 259.

Compagnie Francaise vs. State Board Health La. U.S. 46 Law Ed. 816, 817.

Court will not enjoin the President from performing an official duty.

Mississippi vs. Johnson, U. S. 18 Law, Ed. 437.

The Courts will not interfere with the executive officers of the Government in the exercise of their ordinary official duties.

United States vs. Raum, 34 Law Ed. 105.

What are the duties, powers and privileges of the government of Idaho?

In the language of the Constitution of the State, Art IV Sec. 5. "The supreme executive power of

the state is vested in the governor, who shall see that the laws are faithfully executed." Also Art. IV.

"Sec. 4. The Governor shall be commander-in-chief of the military forces of the State, except when they shall be called into actual service of the United States. He shall have power to call out the militia to execute the laws, to suppress insurrection, or to repel invasion."

He is also invested with the appointing and pardoning power, the power to convene the legislature in cases of emergency and to approve or veto bills submitted to him by the legislature.

The power of a court to control the governor is admirably discussed in Hartrauft's appeal 85 Pa. St. 433, 447. The court uses the language: "It is scarcely conceivable that a man could be more completely invested with the supreme power and dignity of a free people. Observe, *the supreme executive power* is vested in the governor, and *he is charged with the faithful execution of the laws*, and for the accomplishment of this purpose he is made commander-in-chief of the army, navy and militia of the state. Who, then, shall assume the power of the people and call this magistrate to an account of that which he has done in the discharge of his constitutional duties? If he is not the judge of when and how these duties are to be performed, who is? Where does the court of quarter sessions, or any other court, get the power to call this man before it, and compel him to answer for the manner in which he has discharged his constitutional functions as executor of the law and commander-in-chief of the militia of the common-wealth? For it certainly is a logical sequence that if the gov-

ernor can be compelled to reveal the means used to accomplish a given act, he can also be compelled to answer for the manner of accomplishing such act. If the court of quarter sessions of Allegheny county can shut him up in prison for refusing to appear before it and reveal the methods and means used by him to execute the laws and suppress domestic violence, why may it not commit him for a breach of the peace, or for homicide, resulting from the discharge of his duties as commander-in-chief? And if the courts can compel him to answer, why can they not compel him to act? All these things, we know, may be done in the case of private individuals; such an one can be compelled to answer, to account and to act. In other words, if, from such an analogy, we once begin to shift the executive power from him upon whom the constitution has conferred it to the judiciary, we may as well do the work thoroughly and constitute the courts the absolute guardians and directors of all governmental functions whatever. If, however, this cannot be done, we had better not take the first step in that direction. We had better, at the outstart, recognize the fact that the executive department is a coordinate branch of the government, with power to judge what should or should not be done within its own department, and what of its own doings and communications should or should not be kept secret, and that with it, in the exercise of those constitutional powers, the courts have no more right to interfere than has the executive, under like conditions, to interfere with the courts."

The foregoing authorities fully sustain our contention of non-interference of the Federal Courts with the Governor of a State in the discharge of his official

duties, particularly in instances involving an exercise of judgment or discretion. The Honorable Circuit Court therefore with propriety declined to step within the province of the Chief Executive of Idaho and attempt to exercise the high prerogatives of that official. And the Court remained clearly within the rules of proper procedure in disregarding the allegations of Appellants' bill upon which they attempted to predicate an investigation into the grounds of the Governor's action. The utter recklessness of the charges, in itself, would be almost sufficient to provoke contempt. It is not a matter of especial surprise they should have been disregarded, as counsel complains, by the Honorable Court. However, even if the allegations were plead with more calmness and discussed with more dignity, the demurrer to the bill would have been properly sustained as complainants prayed for an order beyond the power of the Court to grant.

The executive being a co-ordinate branch of the State Government, and it being made his duty by law to investigate and decide when the conditions were sufficient to warrant him in issuing a quarantine proclamation, and it appearing that in the discharge of this duty he did investigate, and did find that the conditions were such as to require him to issue the proclamation; his decision will no more be investigated than would the decision of the Supreme Court of the state in a matter where it was pursuing its legal functions; the decision of the Governor upon such matter was as conclusive, and entitled to the same weight, faith and credit, as would be given to a decision of the highest Court of the state.

Suppose that Appellants had come into the Circuit Court complaining of a decision of the Supreme

Court of the state instead of the decision of the Governor, and had alleged that such decision was based upon false evidence, or upon no evidence at all; and that the Court in making such decision was in collusion with some one to injure citizens of the State of Utah, there being no Federal question involved, except this alleged wrong doing on the part of the Court, would the Circuit Court have assumed jurisdiction for the purpose of ascertaining if the State Court had acted honestly? Certainly not. Yet this is what Appellants have attempted to do, in regard to the discretionary acts of an equal branch of the State Government. It is sought in this way to raise a Federal question ; but we imagine the Courts will regard it as a sham, and refuse to take jurisdiction.

Was the exclusion of all sheep coming from the infected districts for the period of forty days, a reasonable quarantine regulation ?

This question, as the record will show, was raised in the case of Rasmussen vs. Idaho, 181 U. S., 198, and under the decision in that case, was decided in the affirmative.

Quarantine laws are intended to prevent the spread of disease, and it follows from the nature of contagious diseases that not only must animals bearing the visible marks of disease be barred, but animals coming from a locality where a disease is epidemic, and which are therefore likely to carry disease may be quarantined.

Health officers are justified in taking the greatest care for the prevention of disease.

Seavey vs. Preble, 64 Me. 120.

A civilized community should be satisfied with nothing less. All quarantine laws worthy of the name provide for the exclusion of persons, merchandise or animals coming from infected districts. This quarantine is nothing more than a quarantine against an infected district, which is clearly justifiable, under the decisions of all the Courts, on this subject.

In City of the St. Louis vs. Boffinger, 19 Mo. 13, the Court said :

"If the real design of the ordinance is a quarantine regulation to guard against the introduction of disease into the city, we will not undertake to determine whether some other measure interfering less with commerce could not as well have accomplished the object."

Whether a regulation of this kind is reasonable or not must depend largely on the nature of the disease to be prevented. In the Bulletin on Sheep Scab, issued by the Bureau of Animal Industry (No. 21, page 8), it is said :

"The losses from sheep scab have been and are still very severe in most sheep-raising countries. They are due to the shedding of the wool, the loss of condition and the death of the sheep.

"Although laws were made for the control of the disease as early as the beginning of the eleventh century, general ignorance in regard to its nature and proper treatment has prevented the successful administration of such laws even to the present day. The disease exists in most of the countries of Europe and also in Asia and Africa, and until recently in Australia. Most civilized countries now control the disease to a certain extent, and limit the losses by the

enforcement of stringent sanitary regulations; but the extent of its prevalence is nevertheless surprising. It is a disease not difficult to cure and eradicate and an accurate knowledge of its characteristics with attention to details are all that are needed to secure this result.

In the United States some sections have been overrun with sheep scab and many persons engaged in the sheep industry have been forced to forsake it because of their losses from this disease. It is probable that in its destruction of invested capital sheep scab is second only to hog cholera among our animal diseases. The large flocks of the plains and Rocky Mountain region and the feeding stations farther east have suffered severely and are constantly sending diseased sheep to the great stock yards of this country.

In addition to the direct losses in wool, in flesh and in the lives of our sheep, we have suffered immensely in our foreign trade because of the prevalence of this disease. Great Britain appears to have been the first country to prohibit live sheep coming from the United States by an order issued in 1879. Upon representations that there was no foot and mouth disease in the United States this order was rescinded in 1892, but only to be again enforced in 1896, on account of the many scabby sheep sent abroad by our exporters. Our sheep are consequently slaughtered on the docks where landed, the market being restricted and the prices much less favorable than would otherwise be obtained. The markets of continental Europe have been entirely closed to American sheep, as even the privilege of slaughtering

at the landing places is denied." (Page 8, Bulletin 21).

The increase in the number of the sheep and the consequent crowding of the ranges have made conditions worse than in 1898, when the Bulletin was issued.

Referring again to Bulletin 21 we find it stated at pages 13 and 14:

"All matters connected with the vitality of the scab mite have an important bearing in explaining cases of indirect infection on roads over which scabby sheep have been driven, or in fields and sheds where they have been kept. From the facts now at our disposal we can lay down the following important rules:

Scabby sheep should never be driven upon a public road; sheds in which scabby sheep have been kept should be thoroughly cleaned, disinfected and aired, and should be left unused for at least four weeks (better two months) before clean sheep are placed in them; fields in which scabby sheep have been kept should stand vacant at least four weeks (better six or eight) before being used for clean sheep; a drenching rain will frequently serve to disinfect a pasture but it is well to whitewash the posts against which scabby sheep have rubbed. Even after observing the precautions here given, it is not possible to absolutely guarantee that there will be no reinfection but the probabilities are against it."

After treating of the life of the parasite the Bulletin further says (page 14):

"Several practical lessons are to be drawn from these figures; first, it is seen that the parasites increase very rapidly, so that if scab is discovered in a

flock, the diseased sheep should be immediately isolated; second, if new sheep are placed in a flock, they should either first be dipped, as a precautionary measure or they should at least be kept separate for several weeks to see whether scab developes; third, since the chances of iufection are very great the entire flock should be treated even in case scab is found only in one or two animals; fourth, as dipping is not certain to kill the eggs, the sheep should be dipped a second time, the time being selected between the moment of hatching of eggs and the moment the next generation of eggs is laid."

As the sheep must necessarily be infected with mites in all stages of development even a second dipping will not entirely free the flock from disease, in fact, there is hardly any disease of domestic animals that requires more continuous and careful attention.

For a complete discussion of the nature of the disease we refer to the Bulletin. We also refer to the Rules and Regulations of the Bureau of Animal Industry. By rule 4 (page 33 Bulletin No. 9) a ninety-day quarantine is established for all diseased animals or those which have been exposed to disease.

In relation to sheep scab, we refer in addition to the Bulletin, to the following:

Report chief of Bureau of Animal Industry, 1899, pg. 247. Same report for 1900, pg. 216.

Administrative Work of the Federal Government in relation to the Animal Industry, 1899, pg. 452.

It is argued that the quarantine is unreasonable and bad faith may be imputed from the fact that the proclamation covered forty days in the spring of the year and at the time that sheep were being driven

from the infected districts. We submit that if the flocks of Idaho were to be protected from the disease of the infected districts it could be issued at no other time.

What benefit could accrue from issuing a quarantine proclamation after the flocks had been driven from the infected districts, into the State of Idaho, bearing their loads of disease with them and inoculating a large portion of the Idaho flocks? Sheep are not usually moved from place to place in winter time, and owing to climatic conditions they are not dipped during that season. Owners do not desire to dip ewes until after the birth of lambs. (Bulletin, pg. 19). Spring is therefore a period of great danger. The period of forty days was fixed in the proclamation so that the disease might have time to show itself, and make it possible to detect it. A perusal of the Bulletin cited will show that the presence of this disease is not easily detected, except after the wool begins to slip and sores to develop, which is not until a considerable time after the scab mite is lodged in the wool. This scab mite or parasite is practically microscopic and hides itself where the wool is most abundant, and may not develop so as to readily be detected until several weeks after.

Bulletin 21 on sheep scab, page 10, issued by Bureau of Animal Industry.

A study of these Bulletins will further show that this disease cannot be destroyed in ten days as claimed by Appellants' brief, and we respectfully suggest that no such holding was made by the Supreme Court of Idaho in the case of State vs. Duckworth, Supra. The Honorable Circuit Court, in the case at

bar, simply says that by two dippings ten days a part they could be so far cured as to render their passage through the country safe. This conclusion, however, the Government Bulletins will show is erroneous. But if it were true, that sheep scab can be cured by two dippings, ten day apart, after the disease is discovered, we fail to understand how that can be a basis for the claim, that ten days quarantine was sufficient. It should be noticed that the entire period covered by this proclamation is forty days, and that sheep are not required to wait forty days at the state line before entering the state. Several days would be consumed in reaching the state line after leaving the winter range in the infected district. That the sheep from these infected districts would not all reach the state line in a less period, than that covered by the proclamation, as not all would leave the desert at the same time. It was for this reason, that the period of forty days was no more than was necessary and reasonable.

EQUAL PRIVILEGES DENIED.

Under this head appellants contend that the railroad companies are given a special privilege for the reason that the proclamation prohibited sheep from being driven into the State for forty days, while it only required that those shipped into the State by railroad companies should be quarantined for fifteen days. It will be noticed by the proclamation that sheep imported into the State by railroad companies should be held and quarantined within two miles of the place where unloaded for a period of fifteen days; at the end of that time they should be inspected by the proper officer and if found free from disease should

be allowed to go their way, but if on an inspection they were found to be diseased they were to be held, and dipped as provided for in a general Act of the Legislature, approved March 6, 1901, until they were cured. Under the provisions of that law, which is found page 142, laws of 1901, said sheep could be held at the place where quarantined for a period of ninety days, if it was found necessary by the State Sheep Inspector or his deputy, in order to cure them of disease. The period of fifteen days provided for before inspection was deemed a sufficient period of time for the disease to develop so that it could be detected in case the sheep so shipped in were infected. This Court will easily understand the difference in the sheep being driven into the State and others being shipped in over the railroads. In the latter case all the sheep would arrive in the State at the same time and on the same train and could be taken in charge by the deputy inspector in the county where they were to be unloaded ; while in the case of those being driven in from the winter range, they would approach the State line at different times, some arriving one day, and others 10, 12, 15, 20 or more days thereafter. If the sheep being driven from this infected district had all reached the state line at the same time as they do when shipped in on the train, then a quarantine of fifteen days would have been sufficient perhaps to have developed the fact of their diseased condition, but as this could not in the nature of things happen, the investigation of the Governor showed that a period of forty days was the shortest time within which it could be safely expected that all of the sheep from this infected district would arrive at the state line. This was the purpose of the

difference in time, which was entirely reasonable, honest and necessary.

TAKES PROPERTY WITHOUT DUE PROCESS OF LAW.

Under this heading Appellants complain that the State Sheep Inspector or his deputies are authorized by the law to seize sheep which are being driven into the State in violation of the Governor's Proclamation and to sell them for the purpose of paying the expense of driving the sheep from the State and the fines and costs provided for in the Act. The Appellants in their brief state: "The Inspectors are evidently authorized to enter judgment in their own minds or elsewhere as they please, fix the amount to be charged, and that becomes a judgment lien upon the sheep." An investigation of the law will show that the basis for this argument originated entirely in the imagination of the brief maker and has no foundation whatever in the law referred to. The bills and costs referred to in the Act are those provided for in Section 2 of the Act which shall be entered in the Court of Justice against those who are convicted of a violation of the law. The costs which are authorized to be paid in expelling the sheep, are the salaries of the Deputy Sheep Inspectors who are engaged, and are fixed at five dollars per day for each deputy. And an inspection of the law will show that all of these matters are fixed and provided for by law and not left to the whim or discretion of either the State Sheep Inspector or his deputies. For salaries of the Sheep Inspectors see Sec. 15, page 147, Laws 1901.

CONFLICTS WITH THE FEDERAL LAWS.

The record of the case of Rasmussen vs. Idaho, 181 U. S. 198, will show that this question was also discussed and submitted to the Court and that the Court by holding said law a valid quarantine law necessarily decided that it could be enforced and was proper notwithstanding there was some Federal legislation in regard to the inspection of livestock. An examination of these Acts of the National Congress will show that they principally apply to the shipment of livestock from one State to another. The first Act of Congress seems to have been in 1865 and amended in 1866, secs. 2493–5, R. S., U. S. No further legislation was had until 1884 when the Bureau of Animal Industry was established. This was followed by the Act of August 30, 1890, and March 3, 1891, and the Act of March 2, 1895. The legislation of Congress pertinent to the present inquiry is Sections 3, 6 and 7 of the Act of May 29, 1884.

Whether or not the rules and regulations which seem to have been promulgated by the Department in 1887, were ever certified to the authorities of the State of Idaho, or not, is not shown by the record, and we have been unable to learn. In any event, although the record is silent on the subject, there has been no acceptance of the regulations by the State and no co-operation between the State and National Governments. In fact, there is and has been no law of the State whereby the rules of the Department could be adopted or joint action taken. Is the State then barred from enacting the statute in question? We insist not. The Act did not purport to take from the States the power claimed, but on the contrary under the terms of Section three, there was a direct acknowl-

edgment of it. The Act sought to secure co-operation. There having been no acceptance by the State of the rules and regulations of the Department the remaining question is whether or not the enactment by Congress of Sections 6 and 7 is a bar to the State law. These sections in substance provided that it should be a misdemeanor to drive stock from one State to another knowing them to be affected with disease. These sections are in no sense a quarantine measure framed for the purpose of preventing the spread of disease.

We think the question is settled by the decision of the Supreme Court of the United States in the case of Missouri, K. & T. R. Co., vs. Haber, 169 U. S., 613, where the Act of Congress mentioned and a somewhat similar state statute were under consideration."

It is a settled rule that a statute enacted in execution of a reserved power of the state is not to be regarded as inconsistent with an Act of Congress passed in the execution of a clear power under the constitution, unless the repugnance or conflict is so direct and positive that the two Acts cannot be reconciled or stand together.

Sinnot vs. Davenport, 22 How. 227.

"While under the provisions of the Act of Congress the state were invited to co-operate with the general government in the execution and enforcement of the Act, whatever power they had to protect their

domestic cattle against such diseases was left untouched and unimpaired by the Act of Congress."

Railroad Co. vs. Huson, 95 U. S. 465.

The Passenger Cases, 7 How. 283.

Patterson vs. Kentucky, 97 U. S. 501.

Gilman vs. Philadelphia, 3 Wall, 713.

Railroad Co. vs. Kentucky, 161 U. S. 699.

License Cases, 5 How. 576.

Gibbons vs. Ogden, 9 Wheat. 203.

This position is sustained by the later cases cited in appellants' brief from the Supreme Court of the United States.

Believing that no error was committed by the lower court in sustaining appellees' demurrer we ask that the decision be sustained.

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